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In the

Supreme Court of the United States

October Term, 1996

SOON DUCK KIM, *et al.*,
Petitioners,

v.

THE CITY OF NEW YORK,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the State of New York

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

When the New York Court of Appeals held that Mrs. Soon Duck Kim was not entitled to just compensation after the City of New York (City) permanently invaded her land, the court determined that fundamental attributes of ownership–such as the rights to use property or to exclude others–are transferred to the state when the title to private property changes hands.

Pursuant to Supreme Court Rule 15.6, Mrs. Kim files this reply to the brief filed by the City in opposition to her Petition for Writ of Certiorari.

ARGUMENT

I

THE DECISION OF THE NEW YORK COURT OF APPEALS WAS NOT BASED ON INDEPENDENT STATE GROUNDS OR ON COMMON LAW PRINCIPLES

The New York Court of Appeals held that every legislative act can redefine property rights when land is transferred and that, once taken from the owner, these rights cannot form the basis for any takings claims. The New York court concluded that because Mrs. Kim had been divested of the right to exclude the City, she was not entitled to compensation after her land was permanently physically invaded by the City. The court based its conclusion not on independent state grounds but rather on its (mistaken) understanding of federal takings jurisprudence, particularly as it relates to background principles of property law. The City's assertion to the contrary is based on its misunderstanding of the doctrine of independent and adequate state grounds and misconstrues the essence of the opinion below. The City confuses a conclusion of the court below–that the City can invade Mrs. Kim's property based on an interpretation of the City's charter provision–with the issue on appeal–whether the federal Constitution will tolerate such permanent physical invasions.

The City cites *Michigan v. Long*,[1] for the proposition that this Court has no jurisdiction to hear this case. Opposition Brief (OB) at 11. However, as this Court in *Long* went on to note:

> In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached.[2]

This Court concluded that "dismissal is inappropriate 'where there is strong indication ... that the federal constitution as judicially construed controlled the decision below.'"[3]

In this case, the holding of the court below was not simply a matter of how a city charter provision should be interpreted or applied to a particular parcel.[4] Rather, the New York court sought to harmonize the City's physical invasion of Mrs. Kim's property with the limitations on uncompensated takings found in the federal Constitution as interpreted by this Court. Thus, the New York court relied on its interpretations

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[1] 463 U.S. 1032 (1983).

[2] *Id.* at 1038.

[3] *Id.* (quoting *State of Minnesota v. National Tea Company*, 309 U.S. 551, 556 (1940)).

[4] Certainly, the decision that the City could permanently physically invade Mrs. Kim's land was not based, as the City would assert, on New York's common law doctrine of lateral support. OB at 12-13. The New York court specifically declined to "define the precise contours of the common-law duty in this case, because the property owner's obligation ... finds its specific, contemporary formulation in the New York City Charter." Appendix to Petition for Writ of Certiorari (App.) at A-9.

of *Board of Regents of State Colleges v. Roth*,[5] *Loretto v. Teleprompter Manhattan CATV Corp.*,[6] *Nollan v. California Coastal Commission*,[7] and *Lucas v. South Carolina Coastal Council*,[8] in arriving at its conclusion that, when Mrs. Kim acquired her land, she did not acquire the prior owner's right to compensation if the City buried it under fill.[9]

In *Long*, this Court stated:

> If the state court decision indicates clearly and expressly that it is ... based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[10]

In this case, no such unequivocal statement was made. To the contrary, the opinion below is permeated by citations to this Court's decision in *Lucas v. South Carolina Coastal Council*,[11] particularly regarding *Lucas*' reference to "[a] threshold inquiry into an owner's title." App. at A-4. The

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[5] 408 U.S. 564 (1972).

[6] 458 U.S. 419 (1982).

[7] 483 U.S. 825 (1987).

[8] 505 U.S. 1003 (1992).

[9] The holding that every newly enacted land use restriction becomes a limitation on a subsequent owner's title was also announced by the New York court in three other cases decided the same day, *Basile v. Town of Southampton*, 678 N.E.2d 489 (1997), *Gazza v. New York State Department of Environmental Conservation*, 1997 WL 68590 (N.Y. Feb. 18, 1997), and *Matter of Anello v Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (N.Y. Feb. 18, 1997). App. at A-7.

[10] *Long*, 463 U.S. at 1041.

[11] 505 U.S. 1003.

lower court expressly relied upon *Lucas* as well as *Munn v. Illinois*[12] when it concluded that every land use restriction, no matter what its source, became a limitation upon Mrs. Kim's title. App. at A-7.

It is not the interpretation of New York's law that underlies the holding in this case. Rather, the holding rests on whether the federal Constitution gives a state *carte blanche* to redefine property with each transfer of ownership and, in so doing, deprive landowners of rights protected by the federal Constitution.

The New York court justified the City's uncompensated physical occupation of Mrs. Kim's land by its interpretation and application of this Court's Fifth Amendment takings jurisprudence. The City may choose to overlook the fact that the lower court's decision rests entirely on misinterpretations of federal constitutional law, but this cannot insulate the taking of Mrs. Kim's property from review by this Court. This Court clearly has jurisdiction to review a state court decision applying federal constitutional law to a legislative enactment in a manner that authorizes a city's uncompensated physical occupation of private land.

II

THE FEDERAL TAKINGS QUESTION IS PROPERLY BEFORE THIS COURT

The principal issue in this case is not whether the state court based its decision on background principles of state

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[12] 94 U.S. 113 (1876).

property law[13] but, rather, *whether the court is free to redefine those principles in violation of the United States Constitution.*

The New York court held that Mrs. Kim could not prevail on her takings claim because the obligation imposed on her became a part of her title when she acquired her property. App. at A-14. The court unquestionably reached the federal question of whether the City's invasion of Mrs. Kim's property constituted a taking for which she might be entitled to payment of just compensation; the court evaluated Mrs. Kim's takings claim–ultimately denying her any relief–based on its interpretation of *Loretto, Nollan,* and *Lucas.*

The City's observation that Mrs. Kim failed to assert a federal constitutional claim in her complaint (OB at 13 n.5) is irrelevant to the question of whether such a claim is properly raised before this Court.[14] The City concedes, as it must, that the federal issue was raised in the trial court (OB at 5 n.3) and that it was addressed by the trial and appellate courts that reviewed the case (OB at 5, 6).

Even if the lower state trial and appellate courts had not expressly addressed Mrs. Kim's federal constitutional claim,

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[13] The City suggests that, because its invasion of Mrs. Kim's property resulted from the application of state law, the concomitant redefinition of her rights must be examined solely under state law and cannot serve as the basis for a federal claim. Under this logic, this Court could not have decided *Lucas* since the state court opinion was based on an interpretation of South Carolina law.

[14] *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (failure to include federal constitutional question in earlier proceedings has no effect on Supreme Court's jurisdiction where the state court deemed the federal constitutional question to be before it).

which they assuredly did,[15] this Court's jurisdiction would nonetheless be warranted because New York's highest court interpreted and applied the city charter in a manner that violates the Fifth Amendment to the United States Constitution.

The lower court's opinion clearly sets forth Mrs. Kim's federal constitutional claim and rejects it as not supported by federal authority. App. at A-3. Distinguishing *Loretto*, the New York court held that Mrs. Kim's title never encompassed the right to compensation for the City's burying a portion of her land. App. at A-4. Refusing to limit the antecedent inquiry required under *Lucas*, either with respect to time or source of land use restrictions, the New York court held that Mrs. Kim's title was encumbered by all existing restrictive statutes or notices of governmental encroachments, whatever their source, in effect when she acquired her land. App. at A-6-7.

In its opinion, the Court of Appeals considered *and rejected* petitioners' contention "that the City's action in placing side fill on almost 2400 square feet of their property constitutes an unconstitutional taking of a portion of their property without just compensation." App. at A-3. In doing so, the highest court of the state interpreted a law and federal takings jurisprudence in a manner that compels Mrs. Kim to suffer an uncompensated invasion of her land in derogation of the Fifth Amendment to the United States Constitution.

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[15] The state appellate court, citing the federal Constitution, affirmed the trial court's holding that the City's invasion of Mrs. Kim's land "did not effect a 'taking' requiring the payment of 'just compensation.'" App. at B-2.

III

THE NEW YORK DECISION CONFLICTS WITH THE DECISIONS OF THIS AND OTHER COURTS

Finally, the City alleges that the decision of the New York Court of Appeals is not in conflict with the decisions of this Court or with other state court decisions. OB at 15.[16]

To allege that there is no conflict, the City ignores the key issue in the decision below, whether takings liability may be avoided because a land use regulation was enacted before property was acquired. Each of the cases relied upon by petitioners demonstrates that a conflict exists on this important federal question.

The City claims there is no conflict between Florida and New York because the court in *Vatalaro* did not hold that pre-existing regulations could *never* constitute a bar to a takings claim. OB at 17. However, Mrs. Kim never suggested this. Rather she observes that in Florida, under *Vatalaro*, a city cannot take private property *merely because* the land use restrictions were adopted prior to the purchase of the affected

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[16] The City criticizes petitioners' citations to decisions of intermediate state courts. However, the state Supreme Courts declined to review *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223 (5th Dist. Fla. 1992), *review denied*, 613 So. 2d 3 (Fla. 1992), and *Moroney v. Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045 (N.J. App. 1993), *cert. denied*, 642 A.2d 1004 (N.J. 1994). Therefore, these decisions constitute judgments of the highest court of the states. *Sullivan v. Texas*, 207 U.S. 416, 417 (1908) (when jurisdiction declined, judgment of the court of civil appeals became the judgment of the highest court). In *K&K Construction v. Department of Natural Resources*, 551 N.W.2d 413 (Mich. App. 1996), the Application for Leave to Appeal was only recently granted. 562 N.W.2d 788 (Mich. 1997).

land.[17] This holding in *Vatalaro* conflicts with the holding and result in this case. Mrs. Vatalaro wanted to build a home on a residentially zoned lot encumbered by a wetlands restriction. Mrs. Kim wanted to continue using all of her lot, free from permanent physical occupation by the City. When Mrs. Vatalaro purchased her land, she acquired the rights of the former owner including the right to build a home. When Mrs. Kim purchased her car wash, according to the New York court, she did not acquire the right to receive compensation if the City permanently invaded her lot.

The City misapprehends the holding of *Moroney v. Mayor and Council of the Borough of Old Tappan*. In *Moroney*, the New Jersey court observed that

> a right to relief possessed by the original owner passes to the successor in title. Such right is not lost simply because the succeeding owner bought or contracted to buy with knowledge of the lot-size restriction.[18]

The significance of this holding is that, in New Jersey, the rights passed from the original owner to the successor in title whereas, in New York, these rights can be cut off by any transfer of title following enactment of land use restrictions or notices of potential governmental encroachments.

Regarding *Lopes v. City of Peabody*,[19] the City states that it "stands for the wholly unremarkable proposition that,

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[17] In *Vatalaro*, the Florida court expressly rejected the assertion of the Department that "because appellants purchased their property after the enactment of the Warren S. Henderson Wetlands Protection Act of 1984, they were constructively aware that their property was subject to the provisions of the act and did not suffer a compensable taking." *Vatalaro*, 601 So. 2d at 1229.

[18] *Moroney*, 633 A.2d at 1048.

[19] 629 N.E.2d 1312 (1994).

under Massachusetts law, a property owner is entitled to challenge a pre-existing land use regulation." OB at 18. However, *Lopes* was not about what rights exist under Massachusetts law but, rather, what rights could be denied a property owner without violating the Fifth Amendment's Takings Clause. The "unremarkable proposition" was arrived at only after *Lopes* was remanded by this Court in light of its *Lucas* decision. In this case, the New York court held that Mrs. Kim's title was encumbered by preexisting land use restrictions for which she was not entitled to compensation. The conflict between the Massachusetts and New York courts on this issue alone is worthy of this Court's review.

In its criticism of the conflict between the decision below and the decision of the United States Court of Appeals for the Federal Circuit in *Preseault v. United States*,[20] the City misstates the holding of the federal court which was that the rights of owners of land are defined when the property interests are created and not by subsequent legislation or regulations. This assuredly conflicts with the holding of the New York court that the passage of a charter provision and subsequent filing of a map raising the grade of an adjacent street became encumberances on Mrs. Kim's title to her land, forcing her to suffer an uncompensated permanent physical occupation of her property.

CONCLUSION

According to the New York court's holding, Mrs. Kim was not entitled to just compensation for the City's permanent physical occupation of her land. Under the lower court's interpretation of state laws, this Court's takings jurisprudence, and the federal Constitution any landowner's property could be subjected to similar invasions without any constitutional remedy.

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[20] 100 F.3d 1525 (Fed. Cir. 1996).

The City argues that so long as the New York court interpreted *state* law, even where it also relied upon its interpretation of the federal Constitution, the matter decided would be beyond this Court's review. Such a rule would insulate any and all unconstitutional state laws from review by this Court and would deny Mrs. Kim her rights protected by the Fifth Amendment to the United States Constitution. The City's position is contradicted by the entire weight of this Court's takings jurisprudence, under which an owner's right to the peaceful use and enjoyment of private land is unequivocally protected from permanent physical occupations by the state without payment of just compensation.

Accordingly, petitioners Soon Duck Kim, *et al.*, respectfully urge the Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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